UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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OSEPH K. CHANDLER, Appellant, vs. NION OIL COMPANY OF CALIFORNIA, Appellee.	No. 22408

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

Appellant JOSEPH K. CHANDLER filed a complaint under appellee UNION OIL COMPANY OF CALIFORNIA under the federal antitrust laws, specifically under Title 15, U.S.C., Sections 15 and 26, being part of an act of the Federal Congress commonly known as the Sherman and Clayton Acts which vests in the District Court jurisdiction of suits by any person injured in his business or property by reason of anything forbidden in the antitrust laws.

The plaintiff-appellant appeals from an Order Denying Motion for Preliminary Injunction filed November 28, 1967. Clerks REcord at 113, Chandler v. Union Oil Co., Docket No. 7961 (hereinafter cited as R.) The courts of the United States

ay grant injunctive relief under the antitrust laws. 15 .S.C. Sec. 26 (1964). Courts of Appeals have appellate urisdiction of interlocutory orders of the District Courts f the United States refusing injunctions, as follows:

> A. The court of appelas shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the District courts of the United States ... or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court ..." 28 U.S.C. Sec. 1292 1964)

STATEMENT OF THE CASE

A. Statutes Involved

Appellant invoked Sections One and Two of the Sherman Act, 15 U.S.C. Secs. 11 & 2 (1964), and Sections 4 and 16 of he Clayton Act, id., Secs. 15 & 26, in seeking (a) a permanent njunction preventing UNION OIL COMPANY from cancelling the ease of the plaintiff at Grimmer and Durham Roads, Fremont, alifornia, for a reasonable period of time following the termination of this proceeding, and from leasing said service tation to anyone other than plaintiff for a reasonable period f time following the termination of this proceeding (R. 9), nd (b) a preliminary injunction restraining appellee from usting appellant, from refusing to supply gas according to its upply contract, and from by any means preventing appellant

rom selling gasoline to the public (R. 15-16).

Section 4 of the Clayton Act states:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. 15 U.S.C. ec. 15 (1964).

Section 16 of the Clayton Act states in pertinent art:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including Sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is

immediate, at preliminary injunction may issue...Id., Sec. 26

Sections 1 and 2 of the Sherman Act provide:

> Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared to be illegal . . .
>
> Section 2: Every person who shall monopolize or attempt to monopolize or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor . . . Id., Secs. 1 & 2.

B. Averments of Plaintiff Below

Appellee has embarked on a retail price maintenance rogram which appellant complains is an unlawful plan to conrol retail prices of dealers who are in law and in fact ndependent businessmen under the terms of the leases entered nto by them with Union Oil Company. Union Oil Company uses he one year "probationary period" clause in its leases and the ower to refuse to renew three-year leases as part of an nlawful plan to control the judgment of individual dealers s to prices and products, in violation of the Sherman Act, ections 1 and 2.

Since about September 1964 defendant has controlled ealers' retail prices under a so-called Retail Dealer Storage nd Purchase Agreement. Under this agreement, the wholesale rice for the dealer varies according to the fluctuations in

prevailing" retail prices as determined by the Union Oil ompany. When Union raises its calculated "actual competitive etail price" it also raises its wholesale price to the dealer, orcing him to set his prices parallel to those of the com- anies Union considers the price leaders. The wholesale price s thus manipulated by defendant so as to control the dealer's etail prices, (a "floating tank-wagon") and by the suasive ower of the retail representative, founded on cancellation and on-renewal of leases. Retail dealers' margins are based on the onsignment scale in effect under appellee's Retail Dealer onsignment Agreement program and are nothing but sliding-scale ommissions exactly as were paid under that concededly illegal ystem, which appellee used during the period 1955 to 1964.

Independent lessee-dealers are required to follow nion Oil price orders on pain of lease cancellation. (R. 5) laintiff specifically avers that in July 1967 Mr. Gary Rowe, he retail representative of defendant, called on plaintiff and old him that his prices were too high, that he should drop his rices and put in Blue Chip stamps, and that if plaintiff was ot going to go along with "company policy," the plaintiff hould get out and try another company. (R. 7)

Appellant's prices continued at variance with those etermined for his station by Union Oil Company, and that lthough he operated a highly successful business, appellee ought to terminate his three-year lease in furtherance of its lan to control the dealers' independent judgment as to prices nd to destory the independence of the dealers under their eases with Union Oil Company. (R. 8)

C. Proceedings Heretofore

Appellant filed his complaint under the antitrust laws raying for injunctive relief on October 3, 1967, and six days ater his Notice of Motion for a Temporary Restraining Order and reliminary Injunction (R. 15-16), supported by the Affidavit of oseph Chandler (R. 19-22). This affidavit stated that Mr. handler was pumping 55,000 gallons a month whereas the expected allonage at said service station as stated by defendants was 5,000 a month.

The defendant on October 20, 1967, filed its Memo- andum in Opposition to the Motion for Preliminary Inunction, ffidavit of Garry P. Rowe (R. 34), Affidavit of Lee Sovey R. 39-40), Affidavit of Gene W. Burkett (R. 42-44), Affidavit f Richard Haas (R. 46-53), and Affidavit of J. J. Grunewald R. 54-73). These affidavits and especially the affidavit of r. Grunewald, the division sales manager of Union's California orth Coast Division, claimed that Mr. Chandler's prices had othing to do with Union's determination to exercise option of ermination. It claimed that Mr. Chandler had been a difficult an to deal with for the reasons that he refused to attend the ealer training school to become "certified" in any of Union's ervice training programs; that he put insufficient postage on nvelopes mailing credit card invoices; that he would not check he credit card "pickup list" on credit card purchases under 25; and that he had permitted his public liability insurance o expires. (R. 55-56) Mr. Grunewald's affidavit further ndicates that after it was called to his attention that Mr. handler had retained counsel, Union decided to offer Mr.

Chandler a lease requiring 24-hour operation, which Mr. Chandler refused, but does not admit any causal connection. (R. 56-57)

Mr. Grunewald denied that Union Oil was engaged in any program or scheme to control dealer's retail prices. (R. 58-61) The affidavit of Gary P. Rowe, Union Oil Company's retail representative, denied that he ever told Mr. Chandler that his prices were too high, and that he had ever told Mr. Chandler that he should drop his prices. (R. 35) Mr. Chandler contradicted the substance of these affidavits in his Affidavit of Joseph Chandler filed October 27, 1967. (R. 83-90)

Union Oil Company filed its answer October 26, 1967, denying the allegations of the complaint except that it admitted certain aspects of its interstate commerce activites (R. 75); its entering into Retail Dealer Consignment Agreements about May 1955 (R. 76); and its entering into a lease with Mr. Chandler as attached to the affidavit of J. J. Grunewald, Exhibit A herein (R. 76). Union Oil claimed that it had no information sufficient to form a belief as to the truth of the averment that plaintiff was charging 35.9 for regular and 38.9 for ethyl. (R. 76) It admitted that it sent a notice of termination of the lease to Mr. Chandler and denied that any commands were given by Mr. Rowe to Mr. Chandler. (R. 77)

Plaintiff thereafter filed Affidavit of Frank K. Weingartner (R. 91), Affidavit of Vernon Ellsworth, appeallant's insurance agent (R. 147-157), and Affidavit of James W. Hambleton (R. 145-146). Union Oil Company filed supplemental affidavits: Supplemental Affidavit of Gary P. Rowe (R. 94-101); Affidavit of Roland C. Simonsen (R. 103-105); Supplemental

Affidavit of Lee Sovey (R. 107-108); Affidavit of R. C. Weaver (R. 110-111).

On October 30, 1967, plaintiff's motion was continued to November 3, 1967, at which time arguments were heard before the Honorable Lloyd H. Burke. (R. 159) Judge Burke concluded that he should have a hearing on plaintiff's motion, and the matter was continued to Thursday, November 9, 1967. Reporter's Transcript of Hearings, 54-55, Chandler v. Union Oil Co., Docket No. 47961 (hereinafter cited as Tr.). After hearings held before Judge Burke on November 9, November 13, and November 17, 1967, the court issued its order denying plaintiff's motion. (R. 113; Tr. 367-370)

The Court on plaintiff's motion allowed plaintiff a seven-day stay order pending appeal. (R. 372) Plaintiff then filed his notice of appeal (R. 135) and filed in this Court his Motion for Order to Stay Enforcement of Order Denying Plaintiff's Motion for a Preliminary Injunction, Memorandum of Points and Authorities, Affidavit of Maxwell Keith, and Proposed Order. Appellee filed its Memorandum in Opposition to Appellant's Motion to Stay Enforcement of Order and this Court on December 5, 1967, denied petitioner's motion for an order to stay enforcement.

FACTS

a. Origin of the Controversy

Appellee let the service station property on Durham and Grimmer Roads, Fremont, California, to appellant. (R. 62-65) The lease is for a three-year term, November 18, 1967, to November 17, 1969, subject to a one-year "probationary period"

clause. (R. 63, Para. 10; R. 6-7)

The lease provides for specified rent payable monthly with annual minima of $6,660 for the first lease year, $7,676 for the second lease year, and $8,458 for the third lease year. The lessee also agrees to pay as rent the sum of two cents per gallon for each gallon of gasoline delivered to the station, or, at Union's option, sold therefrom, and in addition an amount determined by lessee's sales revenues from certain other products. The lease limits the use of the premises to the operation of a gasoline station and provides that the lessee has the duty to maintain the premises and the improvements in good repair and in clean and safe condition. Under the lease Mr. Chandler agrees to indemnify Union Oil Company against any claim for injury to property or person occurring on the premises during the operation of the lease. He further agrees to carry policies of insurance satisfactory to Union issued by an insurance company approved by Union with certain specified liability limits. The lease provides for eighteen hours of operation, from 6:00 a.m. to 12:00 midnight. (R. 65)

The lease refers to a retail storage and purchase agreement between the parties and provides that any breach of that agreement is a breach of the lease and that, at the option of Union, written, noticed cancellation of the contract terminates the lease. (R. 62, Para. 4) The Retail Dealer's Storage and Purchase Agreement provides that Union Oil shall have title to gasoline stored at the service station until the gasoline is dispensed through the dealer's pumps. Under it the dealer is solely responsible for operation of the station,

management of his staff and control of his legal and financial obligations. The storage and purchase agreement is also for a three-year period subject to prior right to terminate based upon the provisions in the lease. (R. 68, Para. 12)

* * *

Union Oil Company sought out Joseph Chandler in about October of 1966 and attempted to interest him in a new service station located at Grimmer and Durham Roads, Fremont, California. (Tr. 89-91, 109) Mr. Chandler was interested in the location and asked to see the papers that needed to be signed. The papers were not produced, but Union assured Mr. Chandler it had a good deal for him. Appellant accepted the station and opened on the 18th of November, 1966, without having signed the lease involved. The lease was not presented to Mr. Chandler until the afternoon of opening day. (Tr. 95, 98-99) At that time Mr. Chandler noticed the "probationary period" clause and questioned Union Oil Company's representative, Mr. Roland Simonsen, about it. The court below made no findings as to whether Mr. Simonsen said, as appellant testified, that it was in there for only guys who ran a garage and did not pump a lot of gasoline, and whether Simonsen further advised Mr. Chandler, "Don't worry about the one-year clause." (Tr. 101) It was only after their conversation that Mr. Chandler signed the lease, at about 1:30 p.m.

Union Oil Company's representatives had said nothing about Mr. Chandler's right to operate as a "purchase and sale" dealer, and had talked in terms of a "good deal" under Storage and Purchase in that the dealer didn't have to "tie his money

p". (Tr. 94) Under "purchase and sale", the dealer would urchase his gasoline at the price prevailing when delivered o the station. Under "storage and purchase", the gasoline tored on the premises is Union's, and is bought by the dealer s he pumps it out. Thus the dealer must buy at Union's loating dealer's price. On opening day Mr. Chandler was also old that he was expected to purchase Union Oil Company's ponsored auto filters, Auto lite brand, and was requested to ebox his Delco-Remy supplied in Autolite boxes. (Tr. 123-124)

From the outset appellant displayed the ability to un a highly successful business. Employing his own judgment bout all matters in which he was not restricted by his agree-ents, he more than doubled the gallonage figure projected for ne station by Union's retail sales supervisor. (R. 81)

During the first seven months there was little fric-ion between the parties. Union adjusted the training school equirement in view of Mr. Chandler's experience. (R. 105; r. 91-92) Mr. Chandler maintained public liability insurance t all times, (R. 148) and operated a clean, well-staffed tation. Union required Mr. Chandler to pay credit charge ickbacks where the uncollected charge was on an account listed n Union's "pickup" mailings. Mr. Chandler complained it was ommercially impossible to check each card against a lengthy ist of numbers before completing the transaction, but accepted ne kickbacks as a cost of doing business except for purchases n cards designated as highest credit rating ("gold cards", see r. 167); he continued to negotiate with Union as to their

espective responsibilities for gold card charges. Otherwise, ie sole source of complaint by Union was that Mr. Chandler id put insufficient postage on his mailings to Union. This ppellant corrected on request in February or March, 1967 R. 85.) In June 1967, retail representative, Mr. Gary P. Rowe, id come on the premises and examined Mr. Chandler's records ithout permission. (Tr. 115)

Shortly thereafter, Mr. Rowe on June 6, 1967, came to . Chandler's station. Mr. Chandler had been charging 35.9¢ r regular gas and 36.9¢ for ethyl gasoline. Mr. Rowe mmented that appellant's gallonage had dropped, and appellant dicated he was doing all he could think of to retain stomers. Mr. Rowe replied that he can drop his retail prices the level of 33.9¢ and 36.9¢, like Hebel's at Warm Spring. . Rowe further said that if he was not going along with mpany policy, he should get out and try another company. r. 116-117)

Mr. Chandler continued to charge 35.9¢ and 38.9¢ and d not put in Blue Chip stamps. On June 12 Union Oil Company ticed an hour-infraction in that the station opened at 6:17 m. instead of 6:00 a.m. For this infraction Mr. Rowe re- ested that a lease violation notice be issued. (Pl. Ex. 9) . Burkett, Union Oil's sales manager, then sent a letter of . Chandler complaining of this seventeen minute infraction l. Ex. 10) and warning him that it would result in lease ncellation. Without telling Mr. Chandler, Union Oil Company vertised his station as available as early as July 28, 1967 l. Ex. 11).

On or about July 31, Mr. Chandler received a phone
ll from Mr. Rowe asking him if he would buy some tires and
tteries. (Tr. 121) Mr. Chandler told Mr. Rowe that he
dn't feel it was right that he buy any more Union tires and
tteries because he had heard that they were kicking him out
the station. Mr. Rowe at first denied it, then said, "We'll
out and have some lunch and talk it over." (Tr. 122) The
nversation that ensued is related by appellant:

> I met him at my station at 12:00, and he and I went to the Lyon's Cafe in Fremont, and during this lunch he admitted that he had interviewed three or four dealers for my station and that they -- he was to make his decision with his supervisor the next morning as to whether they were going -- he would put me out, whether he would favor putting me out. And that if I would change my -- go along with Union's policies and buy all my products from them, that he would make the decision in my favor.
>
> And I informed him that I would continue to operate as an independetn businessman, and that when he made his decision, why, it make it with that in mind.
>
> And he agreed to call me the next morning,

which he did, and told me that he had met with his supervisor and they had decided to take the station. (Tr. 122)

Nine days later Mr. Chandler received a letter dated August 2, 1967, seeking to terminate his tenancy under the one-year "probationary period" clause. Both appellant's leasehold and his ability to obtain gasoline are now under attack by appellee. Since December 1967 Union has refused appellant gasoline and since March 8, 1968, has denied appellant access to the premises pursuant to a state "unlawful detainer" judgment.

That it was neither usual nor sensible for Union to terminate its high-gallonage dealer is material only insofar as it shows the relationship between the letter of August 2 and the retail price-setting policies which have been pursued by appellee for nearly fifteen years through various devices. Chandler's record was superb. Union could point to only three small hour infractions and a single customer complaint during appellant's entire period of operation. (See Def. Ex. F) He had made no purchase which violated his agreements. But the independence Chandler showed was directly contrary to a cardinal tenet of Union's marketing program: that it is in the interest of the Union Oil Company that its dealers charge specified prices to the motoring public.

This was made explicit at a dealer meeting of September 7, 1967. There Gary Rowe told Mr. Frank Weingartner and Mr. William Lawson that Chandler was a good dealer. According to appellant's witnesses, Rowe went on to say that he had someone who would come in and take the station as a twenty-four hour

peration giving Blue Chip stamps, and, who would charge 33.9 nd 36.9 cents per gallon of gasoline. (Tr. 252-255, 264-265)

These were the new prices set by Union as proper retail for its gasolines in the area, and were the subject of a campaign beginning September 16, 1967, in which Union urged its dealers to charge a three-cent differential, or "spread", between regular and high-test, instead of the then customary four-ent spread. Union sent its representatives to the dealers' places of business with new price signs and numerals, and adjusted its wholesale prices accordingly. (Tr. 304-308; see Pl. x. Nos. 6, 15-17, 19)

Despite these indications of an attempt on Union's art to secure compliance with its retail price determinations y suasive means, the court below refused to hear evidence on ppellee's business methods. (Tr. 299)

b. Findings Below

The District Court based its denial of plaintiff's otion on two express grounds. First, that there was not ufficient showing of likelihood of sucess that appellant would revail at the time of trial; and second, that plaintiff did ot suffer irreparable harm or damage inasmuch as Union Oil ompany is able to respond to treble damage judgment. The Court urther indicated that it regarded its jurisdiction as based olely upon Section 16 of the Clayton Act and that it was not oing to go into the matter of defendant's good faith or good ause under its general equity power. (See Tr. 369-370)

c. Other Cases Pending Between the Parties

Union Oil Company has filed an action in unlawful de-

ainer in the Alameda County Superior Court. Judgment of the rial court was for plaintiff, and an appeal is anticipated. s the trial judge denied appellant's motion for stay of execution until final determination of the issues involved, ppellee is now in possession of the premises. Until such time s appellee is enjoined from its efforts to nullify or terminate ppellant's leasehold, appellant is unable to utilize the roperty and is thus being prevented from there engaging in his eans of livelihood.

JOSEPH CHANDLER has filed an action against Union Oil ompany in the same court charging Union Oil Company with breach f its lease and supply contract agreements and violation of the rtwright Act. This action has not been set for trial.

QUESTIONS PRESENTED

1. Where a party seeking a preliminary injunction s raised questions going to the merits so serious, substantial, d difficult as to make them a fair ground for litigation and us for more deliberate investigation, must he also show obability that such questions will ultimately be resolved in s favor before such injunction will issue?

2. Is a defendant who is financially able to respond treble damages for its antitrust violations immune from junctive relief against its efforts to destroy the business tablished by a plaintiff on the ground the harm so done cannot irreparable?

3. May a federal district court refuse to exercise s general equity jurisdiction in considering a motion for pre-

.iminary injunction which is based on antitrust violation?

4. May a district court exclude matters tending to show operation of a defendant's illegal plan and program from its hearing upon a plaintiff's motion to obtain a preliminary injunction against a phase of such plan and program under Section 16 of the Clayton Act?

SPECIFICATION OF ERRORS

1. The Court applied an erroneous standard or element of proof in denying a preliminary injunction.

2. The Court incorrectly restricted its equitable subject matter jurisdiction to conduct directly violative of Federal statute by excluding consideration of defendant's bad faith, overreaching, fraud and misrepresentation from its decision on injunctive relief.

3. The Court erred in excluding evidence as to the illegal operation of Union Oil Company's retail dealer storage and purchase agreement program and policy.

4. The Court erred in accepting the existence of motivations other than those violative of the Sherman Act as a complete defense.

5. The Court erred in considering destruction of a business reparable by treble damages as a matter of law.

6. The Court exceeded its discretion in denying plaintiff's motion for a preliminary injunction on the record below.

7. The Court erred in failing to make Conclusions of law sufficiently expositive to permit review.

SUMMARY OF ARGUMENT

The Court has before it the parties to a three-year lease covering the property where appellant does business. The appellee-lessor is also the wholesale supplier of appellant-lessee's main item of trade, gasoline.

The suit arose over appellee's ouster of appellant and its efforts to prevent him from obtaining gasolines bearing appellee's trademark. Because appellee's actions are a key part of its program to control the price at which merchants resell its gasolines in interstate commerce, suit was brought under the federal antitrust laws. The subject of this appeal is denial of appellant's motion for a preliminary injunction, whereby he seeks to retain his leasehold and livelihood pending final adjudication of the rights of the parties.

At least two reviewable issues are raised by the ruling below: (1) Did the district judge, in setting the standard of proof, apply incorrect legal principles to appellant's motion? (2) Was the Court's exclusion of evidence bearing on the illegality of appellee's conduct prejudicial to appellant's right to a fair hearing on all issues?

While the exercise of a trial judge's discretion in granting a preliminary injunction is reversed only for "abuse", conduct of the court outside the area of discretion is fully reviewable. Although in this case the findings of fact and, particularly, the conclusions of law are so incomplete as to make review difficult, the record is sufficiently clear to reveal error. Rather, then, than simply to remand for more revealing findings, this Court should offer guidance where error

appears.

The court was not acting in a discretionary area if, as appears by implication, it ruled that the plaintiff seeking to enjoin loss of his business resulting from an antitrust violation by his lessor-supplier must demonstrate likelihood of ultimate success. Although the federal district courts are in conflict as to the correct test, the choice of test is unquestionably a matter of law which this court must review.

The Third Circuit has had occasion to enunciate the rule applicable in trial courts, and appellant urges this court to follow suit. In district courts, under the prevailing authority, a party in whose favor the equities lie is entitled to a preliminary injunction in cases whose ultimate outcome is doubtful if his complaint raises issues so serious, substantial and difficult as to be fairly subject to further litigation. Those district courts which have held otherwise mistakenly adopt the rule which has been held applicable to motions made in circuit courts, where the movant may indeed be required to show a great likelihood he will prevail.

Even on undisputed facts appellee's ouster of appellant raises a serious question, viz., whether an oil company may use its sales supervisors to specify retail prices to its dealer in conformity with announced company price policy, where the dealer's place of business is rented from the oil company on a three-year lease which may give short-notice termination rights to lessor, and where termination or non-renewal is directly affected by the recommendation of the sales supervisor, whose duties include implementation of company policies and

rketing decisions. The lawfulness of such a scheme is uarely questioned by appellant's complaint. The fact the pellant cannot exclude all other motives in appellee than ice-fixing does not gainsay the key role of lease-cancel-tion in a price-control system to which he was subject, nor es it render insubstantial the contributory effect of his ncompliance with price policy.

Though it may ultimately be found that price-control s appellee's only motivation, it was error for the district dge to require such a showing as a precondition of prelimin-y injunctive relief. If the possible existence of motives related to price is made a complete defense to preliminary junctive relief from damaging behavior, then the overwhelming jority of violators will be freed to continue harming their ctims until the day a judgment becomes final. In the field antitrust litigation this is a death sentence for small aintiffs.

The court also ruled that appellee's ability to spond to damages was an adequate remedy. Such a ruling is not ercise but abdication of a trial judge's discretion to con-der the adequacy of a remedy at law. The court below did not ve the power to erect an equitable maxim of de jure adequacy shield the well-capitalized wrongdoer from exercise of its junctive sources.

In ruling on the scope of the issues, the court ex-uded evidence of how appellee's price-control system operates d of inequitable conduct on the part of appellee in securing e agreement which it contends gives it the right to terminate

ppellant's leasehold. The record does not indicate the eason why the court, having considered appellant's showing on he ultimate issues pivotal, did not permit appellant to prove nat appellee is carrying on an unlawful price maintenance rogram. The court, however, did indicate that it would exclude vidence of all inequitable behavior except that which directly iolated the antitrust laws on the grounds that such issues ere for the state courts. In this the court misconceived the cope of its jurisdiction, which includes the granting of com- lete relief beyond the language of the federal statutory re- edy where chancery is invoked. By refusing to hear appellant t deprived itself of an informal conscience and appellant of a ubstantial right.

ARGUMENT

I. VICTIMS OF ANTITRUST VIOLATIONS CANNOT BE REQUIRED TO DEMONSTRATE PROBABILITY OF ULTIMATE SUCCESS BEFORE THE COURTS WILL TEMPORARILY ENJOIN DESTRUCTION OF THEIR BUSINESSES.

In this section appellant directs the attention of ne Court to the area outside the discretion of the district udge below. How that discretion was exercised is treated eparately in part II.B., infra, p. 48.

It is as essential that the circuit courts be atisfied that correct principles of law were applied in denial f a preliminary injunction as in its granting. Cf. Sparks v. ellwood Dairy, 74 F.2d 695 (6th Cir. 1934) (findings & conclus- ons not set forth). There is not less responsibility to see nat trial courts make full and impartial determinations of

facts. See Sims v. Greene, 161 F.2d 87 (3d Cir. 1947); cf. Pacific Cage & Screen Co. v. Continental Cage Corp., 259 F.2d 87 (9th Cir. 1958); Chas. Pfizer & Co. v. Zenith Laboratories, Inc., 339 F.2d 429 (3d Cir. 1964).

In reversing denial of a preliminary injunction where the district court had, inter alia, applied an unduly restrictive test of interstate commerce, the Second Circuit stated the theory of review:

> The granting or denial of an interlocutory injunction is usually relegated to the discretion of the District Court, which an appellate tribunal is reluctant to disturb. State of Alabama v. United States, 279 U.S. 229, 230, 231, 49 S.Ct. 266, 73 L.Ed. 675. But here the trial court's denial of the injunction was based in substantial measure upon conclusions of law which can and should be reviewed because of their basic nature in this litigation. Cf. Bowles v. NuWay Laundry Co., 10 Cir., 144 F.2d 741; Bowles v. May Hardwood Co., 6 Cir., 140 F.2d 914; Coty, Inc., v. Leo Blume, Inc., 2 Cir., 294 F. 679. The case then should be remanded for action by the District Court in the light of the legal principles thus enunciated.

ing v. Spina, 148 F.2d 647, 650 (2d Cir. 1945).

Although this Court has not heretofore confronted a record comparable to that in Ring v. Spina, supra, it has necessarily observed the principle of distinguishing areas of discretion from those reviewable on normal grounds. Thus, in upholding rulings of district courts, this Court has under-

aken to determine whether the trial judge had accurately nterpreted the Organic Act of Guam, Phelan v. Taitano, 233 F.2d 17 (9th Cir. 1956), and whether the court below had correctly pplied a federal trademark act, Dymo Industries, Inc. v. apeprinter, Inc., 326 F.2d 141 (9th Cir. 1964). This duty of eview is in no way inconsistent with the proposition, predicated on the assumption that there was no misapplication or misconeption of law, that a district judge's decision to deny relief s reviewable only for abuse of discretion.

A preliminary injunction is proper when a movant in hose favor the balance of hardship lies "has raised questions oing to the merits so serious, substantial, difficult and oubtful, as to make them a fair ground for litigation and thus ore deliberate investigation." Hamilton Watch Co. v. Benrus atch Co., 206 F.2d 738, 740 (2d Cir. 1953) (court's footnotes mitted). Judge Frank in Hamilton properly directs the attenion of the districts courts to the question of whether the reliminary injunction will cause or prevent harm, rather than hether the moving party can show at the preliminary stage that e will ultimately prevail. See Natco Corp. v. Great Lakes ndustries, Inc., 214 F. Supp. 185 (W.D.Pa. 1962); Briggs Mfg. o. v. Crane Co., 185 F.Supp. 177, 185 (E.D. Mich. 1960) (alernative holding); cf. Thrift Air Club, Inc. v. Eastern Air ines, Inc., 272 F. Supp. 307 (S.D.N.Y. 1967); Parke,Davis & Co. . Green Willow, Inc., 205 F.Supp. 346, 351 (S.D.N.Y. 1962).

Thus there are two distinctions to be made among pplicants for preliminary relief: (a) between those whose ltimate fate is apparent and those who raise fairly litigable

ssues of doubtful outcome, and (b) between those on whom the ardship of denial is only slightly greater than would be the ardship on the opponent of granting the motion, and those toard whom the balance of hardships "tips decidedly," Hamilton, upra, at 740. If under distinction a, the court finds the arty clearly right or clearly wrong on settled law it can act ccordingly. If, however, the resolution of a controlling uestion is doubtful, the court should not end its enquiry, ut should determine the question in b, by balancing the effect f requiring the defendant to continue temporarily to deal ith an able and efficient retailer against the effect on laintiff of his being put completely out of business. It is ot enough to avoid the question by finding defendant able to ay some treble damage claim which may be asserted in futuro.

In this Circuit the question of whether a failure to rove likelihood of ultimate success defeats a motion for preiminary injunction in all instances has not been decided.* here the question of disparity of hardship was apparently not aised it has been held fatal, United States v. Crocker-Anglo at'l Bank, 223 F.Supp. 849 (N.D. Cal. 1963), but no district ourt has criticized or refused to follow the analysis of udge Frank. The Northern District may, indeed, have forhadowed it in United States v. Dollar, 97 F.Supp. 50 (N.D. al. 1951), where the successful movant's ultimate success

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he effect of the public interest in private enforcement of ntitrust laws on the granting of preliminary injunctions is also nsettled. Cf. Federal Trade Comm'n v. Rhodes Pharmacal Co.,

depended upon the overruling of a circuit court decision.

The legality of appellee's leasing-marketing system is in serious dispute. See United States v. Parke, Davis & Co., 362 U.S. 24 (1960); cf. Albrecht v. The Herald Co., 347 Ant. & Trade Reg Rep, X-1 (Mar. 5, 1968); Simpson v. Union Oil Co., 377 U.S. 13 (1964). Clearly the papers and preliminary hearing disclosed questions going to the merits which are substantial, and on which the outcome is sufficiently unclear to make further litigation necessary, and a crushingly greater hardship on appellant then on appellee. On these facts the preliminary injunction should have been granted, under the foregoing test.

Indeed, even if plaintiff were required to show a reasonable likelihood of success, the record shows him entitled to relief:

a. The Wrong

Mr. Chandler has, under all the circumstances of his tenancy, been laced into Union's retail price control system. The Supreme Court made clear in United States v. Parke, Davis & Co., that a supplier may not use coercion on its retail outlets to achieve resale price maintenance ... [I]t matters not what the coercive device it.

Id., 17. The decision in Lessig v. Tidewater Oil Company, 327 F.2d 459-463, (9th Cir. 1964) is useful for comparison with the instant case:

> By maintaining, or increasing, the wholesale price when the retail price declined, Tidewater brought pressure upon dealers to accept "dealer aid" and the accompanying

condition requiring resale price maintenance. In addition, Tidewater's representatives checked the prices at which dealers sold their gasoline, told dealers the price changes they were to make, changed prices posted on their pumps, placed price signs on the station premises reflecting the new price, and threatened to terminate and terminated dealers' leases contracts if dealers did not comply with suggested price changes. Lessig was given notice of termination of his lease and contract three days after he refused to reduce his resale price when Tidewater's district sales manager told him it was two cents too high.

The record showed Union Oil Company maintained a loating tank wagon system, that is, that gasoline prices to the ealers were subject to Union Oil's raising or lowering them at ts discretion. (Pl. Ex. Nos. 6, 15, 17) This ability to luctuate the wholesale price, combined with the price telling ole of the retail representatives in the context of three- ear leases with probationary period clauses, allowed Union il Company to bring pressure on the dealers to adhere to its etermination of retail prices. Plaintiff's Exhibit 15 shows hat reduction in wholesale purchase price depends upon Union il's determination of prevailing retail selling price in the rading area it delineated. Union's price maintenance program hus incorporated the power to "zone" a dealer in a way favorble or unfavorable to his buying price for gasoline.

The affidavit of Mr. Hambleton shows that Union Oil arried out retail price instructions. Mr. Hambleton was told by ie Union Oil Company representative to watch the Shell dealer ross the street; if Shell lowered the price to call Union Oil ompany and they would inform them whether they would lower the ying price on a 70-30 scale.* After the first drop Union Oil tated that if Shell thereafter changed prices Mr. Hambleton ould adjust his retail prices to meet them. (R. 145-146) The ecord further shows that following the September 16, 1967, tter Union Oil Company's retail representatives brought price gns and price numbers to the dealers, virtually all of whom re operating under a three-year lease or a three-year lease th a one-year probationary period clause. (Tr. 306-308). The alers were told at meetings by Mr. Burkett not to raise retail ices even though their costs were increased by promotional de- ces. (Tr. 138)

Six days after the price conversation testified to by Mr. andler, Rowe issued a memo to the Union Oil office asking for e first time that a lease violation notice be issued, based on seventeen-minute "hour infraction" by appellant. (Pl. Ex. No. . A trier of fact could well conclude that this was harrass- nt designed to have the dealer obey company price directions. view of all the facts, Rowe's denial that he

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I.e., the wholesale price declining 0.7¢ for every 1.0¢ de- ine in selling price. This is the same as the sliding con- gnment commission mentioned in Simpson, p. 37 supra, AND AT ST substitutes price instructions for express agency.

iscussed prices does not make Chandler's ultimate success unikely.

There is no question that Union's resale price maintenance efforts are not limited to refusals to deal announced n advance. Its policies are also contrary to the principles hich have grown out of the courts' specific scrutiny of the oil ndustry. The reasons advanced by Mr. Grunewald for the lease ancellation involved matters unrelated to leasehold occupancy. et Judge Yankwich in United States v. Richfield Oil Corporation, 9 Fed. Supp. 280 (S.D. Cal. 1951), made it clear that agreeents relating to or affecting distribution upon a leasehold nterest cannot be superimposed. The court held there that ichfield should be prohibited from using the 24-hour termination lause at all to enforce its restricted conditions as to the roducts sold on the premises. If there are breaches of covenants or conditions or contracts between Union Oil and dealer, it hould resort to the courts for breach of contract or breach of ease, whatever the situation may be. Under the Sherman Act it annot be allowed to exercise cancellation of leases as a means f enforcing its marketing policies.

It is respectfully submitted that Section Sixteen of he Clayton Act, 15 U.S.C. § 26 (1964), expresses the will of ongress that forfeiture of property and such measures as are sed here against a person whose record shows an established uccessful operation become impermissible when part of a priceixing program. The law protects dealers against large distriutors who on the one hand require them to assume all risks of he enterprise and at the same time seek to control them as an

employee. Forfeiture of estates is not favored by general law and is particularly pernicious when invoked to enforce marketing policies in restraint of trade. The Supreme Court in Simpson v. Union Oil Co., supra, enunciated federal antitrust policy that dealers are not to be ousted from their stations for reasons having to do with the control of prices or for refusing to agree that they will obey company policies which include price control.

b. The irreparable injury.

There is irreparable injury when a person loses his business and the goodwill he has generated. A business venture is by its very nature a speculative enterprise. It is basic to our system of government that an individual have the opportunity to take full advantage of his skill and his fortune. The latter may be a necessary ingredient for great success, but its presence cannot be calculated in advance. No court of law can compensate a businessman for opportunities lost through the death of his enterprise, for its ultimate growth is not determined at its birth. It is respectfully urged that the better view is that of the Honorable W. T. Sweigert in Weingartner v. Union Oil Co., 1966 Trade Case Para. 71, 757 at 82,500-82,501. 1965)(uncontroverted allegations prima facie sufficient):

> In the event that preliminary injunctive relief is not granted, plaintiff, who has been engaged in the gasoline service station business at his present premises for more than three years will lose his business, the customer goodwill established during these three years and his means of livelihood -- a result which,

if ultimately held to have been wrongful, would be difficult to compensate in money damages.

> . . . [T]he established business relationship between plaintiff and defendant, involving as it does merely the sale of gasoline to independent service station operators, did not significantly involve personal elements of trust, confidence or other similar factors as would make it unfair to require continuing plaintiff in possession of the service station in question and that defendant resume supplying plaintiff Weingartner with gasoline and other products as before the expiration of the lease, pendente lite or at least until further order of the Court.

It simply cannot be said that money repairs all damage as a matter of law. Trebling provable recovery is at best a clumsy approximation of compensation for imponderables, and cannot be compared with prevention of the wrong for efficiency to the ends of justice." See Rank v. Krug, 142 F. Supp. 1, 160-161 (S.D. Cal. 1956), aff'd in part sub nom. Bugan v. Rank. 372 U.S. 609 (1963); Nadell & Co. v. Grasso, 175 Cal. App. 2d 420, 346 P.2d 505 (1959); cf. Rodgers v. United States, 158 F.Supp. 670, 679 (S.D. Cal. 1958).

There appears to be no issue of causation of injury. That is, if appellee's attempts to take away appellant's lease interest are wrongful under the Sherman Act, then the loss of business is unquestionably the direct result of the violation. The district court's finding (R. 130) that movant had not established price policy as "the cause" behind Union's course of

onduct must, then, be directed not to a causality issue such s that treated in Haverhill Gazette Co. v. Union Leader Corp., 33 F.2d 798, 805-806 (1st Cir. 1964) (harm compensible when ntitrust violation a substantial cause among others), but to he question of illegality itself. Implicit in the finding is misorientation about the reason a given act is or is not a iolation of the antitrust laws under Section 4 of the Clayton ct. Appellant contends but was not permitted to show that nion maintains a resale price maintenance program in which loors are set by a "floating tank-wagon price" plus operating osts (including a per-gallon rent charge) and ceilings by the erculiarly suasive retail price notifications of sales upervisors who also administer appellee's landlord-tenant elationship with the dealers and who make recommendations as o the cancellation or non-renewal of leases. Cancellation and on-renewal are the motive part of machinery whose existence ffends the Sherman Act because its effect is to exact compliance ith the manufacturer's "list" retail prices. Appellant was urt by the operation of Union's price-fixing mechanism regard-ess of whether appellee, were it not breaking the law, would lso have sought termination of his estate.

In its demand for a single-factor analysis of the ermination, the court did not even direct its enquiry to whether urtherance of an unlawful resale price program "substantially ontributed" to appellee's decision. See Osborn v. Sinclair ef. Co., 286 F.2d 832, 837 (4th Cir. 1960), cert. denied, 66 U.S. 963 (1961). As the Osborn court subsequently in-icated, its holding that the company had terminated its lessee

ealer "partly because" he did not abide by its illegal mar-
eting policy, Osborn v. Sinclair Ref. Co., 324 F.2d 556, 569,
75 n.18 (4th Cir. 1963), precluded the defense of right to
erminate under the lease, id., 575 & n.17. Indeed, where, as
ere, the termination is "part and parcel" of the unlawful con-
uct, there is no requirement of direct purpose at all, as these
lements have been stated in the alternative by the Supreme
ourt. See Poller v. Columbia Broadcasting System, 368 U.S.
64, 468-469 (1962).

The immediacy of the harm threatened by appellee is
ow greater than before. Appellee has intensified its attack
n appellant's leasehold and ability to sell gasoline by depriv-
ng him of access to the premises. The fact that Union is
ccupying the station under a state "unlawful detainer"
udgment would not affect appellant's federal right, even if the
udgment were final. Cf. Maryland Gas Co. v. Pioneer Seafoods
o., 116 F.2d 38 (9th Cir. 1940)

Wrongful ouster in violation of a law of the land
romulgated by the Federal Congress is not dignified by its
onsonance with the decision of a state court. See Chase
at'l. Bank v. City of Norwalk, 291 U.S. 431 (1934). Even if,
s is plainly not the case, a state court could conclusively
etermine the issue of right to immediate possession, the pre-
ent appeal would not be affected, as appellant seeks relief
oing beyond mere possession. Cf. Lincoln Printing Co. v.
iddlewest Util Co., 74 F.2d 799 (7th Cir. 1935) (broadly
ramed prayer withstands change in circumstances). To find the
arm to Union in continuing to do business with Mr. Chandler at

the premises in question in any way comparable to the harm to be suffered by appellant from the impending death of his enterprise would be to adjudicate in a vacuum.

II. A PARTY SEEKING INJUNCTIVE RELIEF INVOKES INHERENT EQUITY POWER TO GRANT A COMPLETE REMEDY BASED ON A FULLY INFORMED CONSCIENCE.

A. Misconception of Jurisdiction

The court below erred in restricting its equity jurisdiction. It is respectfully submitted that the federal courts in antitrust proceedings are to use such powers as have been developed by courts of equity, see 15 U.S.C. Sec. 26 (1964) and thus should grant complete relief. A party is entitled to invoke chancery powers to enhance the effectiveness of his legal remedy. Bateman v. Ford Motor Company, 302 F.2d 63, 66 (3d. Cir. 1962). Nontheless, the court below turned its back on the injustice of Union's attempt to terminate the lease in a manner contrary to the statement it made inducing appellant to accept the termination clause.

The court also expressly indicated it would not determine whether Union's marketing methods would be regarded as an antitrust violation. This ruling prevented the plaintiff from showing his full proof on the very subject matter erroneously raised by the question of ultimate success. More significantly, the court thereby deprived itself of an informed ruling on the equities as between the parties.

B. Abuse of Discretion

The term "discretionary" does not oust appellate courts of jurisdiction. See Crites v. Prudential Ins. Co., 322 U.S. 408, 418 (1944). Failure to make distinctions in the

ercise of discretion may be corrected on appeal. Woods v. ty Nat'l Bank & Trust Co., 312 U.S. 262, 270 (1941). Whether not appellant was denied a fair hearing under Truax v. rrigan, 257 U.S. 312 (1921), fundamental fairness requires that e court neither predict outcome nor purport to balance equities thout an examination of appellee's illegal conduct.

CONCLUSION

The Court should reverse the determination below and ther enter a preliminary injunction, or order further hear- gs in which plaintiff can establish more fully at this stage the case the program and policy of Union Oil Company, in cordance with applicable legal principles.

WHEREFORE, appellant respectfully prays that the Order nying plaintiff's motion for a preliminary injunction be cated and that the judgment of the court below be reversed.

Respectfully submitted,

MAXWELL KEITH
R. CORBIN HOUCHINS

By: _____
MAXWELL KEITH
Attorney for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MAXWELL KEITH

AFFIDAVIT OF MAILING

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

VICTOR JACOBS, being duly sworn, deposes and says:

That he has caused to be served a copy of the Appellant's Opening Brief in the above entitled action by mailing a copy of the Appellant's Opening Brief to the following named attorneys for the Appellee in the said case at the address hereinafter set forth, postage paid, this 20th day of March, 1968.

Mr. Richard Haas,
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco, California

Attorneys for the Appellee.

_____
VICTOR JACOBS

Subscribed and sworn to before me
this _____ day of March, 1968.

_____
Notary Public
In and for the City and County of
San Francisco, State of California

My Commission expires: _____

TABLE OF EXHIBITS

Plaintiff's Exhibits

Exhibit Number	Identified	Offered	Received	Rejected
1		96	96	
2		97	97	
3		98	98	
4	111	111	114	
5		135	135	
6		141	141	
7		230	231	
8		230	231	
9		243	243	
0		243	243	
1		244	244	
2	290	6	6	
3	290	6	6	
4	290	6	6	
5		309	309	
6		310	310	
7		310	311	
8	328			
9		329	330	
0	331	330		330

TABLE OF EXHIBITS

Defendant's Exhibits

hibit mber	Identified	Offered	Received	Rejected
		160	160	
		172	172	
		185	185	
		333	334	
		335	335	

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PORTER D. WHITE, Appellant; VS. PEOPLE OF STATE OF CALIFORNIA, Respondent.	CASE No. 22409

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

A P P E A R A N C E S

FOR THE APPELLANT:

PORTER D. WHITE, IN PRO. PER.
BOX 2210 C.C.C.
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FOR THE PEOPLE:

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SAN FRANCISCO, CALIFORNIA

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CONSTITUTIONAL PROVISIONS

THE CONSTITUTIONAL INVOLVED ARE THE SIX AMENDMENT AND THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION, AND CALIFORNIA CONSTITUTION. ARTICLE 6 SECTION 13

Porter D. White
Box 2210
Susanville, California

Appellant In Propria Persona

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PORTER D. WHITE, Appellant, vs. PEOPLE OF STATE OF CALIFORNIA, Respondent.	)	CIVIL No. 22409

TO: THE HONORABLE CHIEF JUDGE AND JUSTICES, AND THE HONORALBE CLERK OF THE ABOVE ENTITLED COURT:

(WITH REFERENCE TO RULE 13: RULES OF THIS COURT)

Porter D. White, (Appellant herein) moves this Honorable Court, and the Honorable Clerk of this Court, that he be allowed to proceed after having prepared the foregoing brief upon irregular paper and in an irregular manner. Appellant is confined in state prison and is therefore a prisoner of the State of California. This institution affords no facilities whereby appellant may adequately meet the requirement of Rule 13.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGONE IS TRUE AND CORRECT.

DATED: JAN. 23, 1963

Porter D. White

Porter D. White. In Pro. Per.

CASES CITED

Porter D. White
P.O. Box 2210
Susanville, California

In Propria Persona

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PORTER D. WHITE, Appellant, vs. PEOPLE OF STATE OF CALIFORNIA, Respondent.	CIVIL No. 22409

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

PURSUANT TO RULES 73 (a) (b) (g), 75 (a) (b). OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RULES OF THIS COURT, RULE 10 (1) and (2) AND RULE 18.

On September 8 1967, an application for Writ of Prohibition was filed in the United States District Court For the Northern District of California, Southern Division, by Porter D. White. (Hereinafter referred to as Appellant) requesting that the First Appellate District Court of Appeal of the State of California be enjoined from further proceedings in the matter of People v. White. #5780. An appeal from the judgment of a Superior Court

of the State of California. The Honorable Stanley A. Weigel United States District Court Judge. denied the Petition for Writ of Prohibition without an opinion. Notice of Appeal was mailed to the United States District Court Clerk. James P. Welsh on October 19 1967. It is from the adverse ruling of the Honorable Judge Weigel, and his failure to give an opinion in the matter that appellant now appeals. Appellant is asking this Honorable United States Court of Appeals to reverse the opinion of the Court below; to grant the relief sought, or to give an opinion why the relief sought should not be granted.

STATEMENT OF THE FACTS

These same questions have been presented to this Honorable Court in several other petitions (see files of this Court #3746) which were denied because an appeal was then pending in the State Court of Appeal for the Firts Appellate District. Appellant is now seeking prohibition against the Appellate Court of California (the District Court of Appeal denied the appeal on December 11, 1967) and the State Supreme Court on the grounds that his trial was a mere farce and a sham, and the State Trial Judge had no jurisdiction to try the case, or that he exceeded jurisdiction by his failure to properly complete the Court at trial commencement, and that the privacy of the deliberation of the jury was invaded by the attorney for the Prosecution, and by another agent of the state, the Public

Defender who had pretended to represent the defense during the trial. Because of the loss of jurisdiction at the trial level in the state court the appellate courts of the state has no jurisdiction upon which to act. However, appellant has sought prohibition chiefly on the grounds that the Appellate Courts of California furnishes no remedy as a matter of law in this case. The following questions have been presented to the Courts of California, and the relief sought therein were denied.

(1) WHETHER THE STATE COURT VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT BY FORCING APPELLANT TO APPEAR IN PROPRIA PERSONA IN VIOLATION OF THE SIXTH AMENDMENT, CONSTITUTION UNITED STATES.

(2) WHETHER THE STATE COURT VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES BY DENIAL OF RIGHT TO COUNSEL OF CHOICE WHEREAS THE ABILITY TO RETAIN PRIVATE COUNSEL WAS SHOWN.

(3) WHETHER APPELLANT WAS DENIED A FAIR TRIAL BY HAVING AN UNPREPARED ATTORNEY FORCED UPON HIM AT TIME OF TRIAL.

(4) WHETHER THE DELIBERATIONS OF THE JURY MAY BE DISTURBED BY THE ATTORNEY FOR THE STATE INVADING THE PRIVACY OF THE JURY DELIBERATIONS.

Although an appeal was pending in the state court, the state court had jurisdiction to act upon the questions whereby were presented the above questions in a petition for habeas corpus (see In re Johnson. 35 Pac. 2d 225). The District Court

of Appeal denied in the issue of counsel on habeas corpus and on appeal: the State Supreme Court denied habeas corpus in all issues which are presented in this appeal-petition. Habeas Corpus will lie to test the legality of a conviction, (see McDonald vs. Moore 353 F. 2d 1065 ex rel Durocher vs. LaValle. 303 (1964). In re Bartges 49 Cal. 2d___. In re Harinear 69 Cal. 2d 404) therefore the state court of appeal, or the Supreme ~~Court~~ have held an evidentary hearing on the matter of appellant's contention especially whereby the Reporter's Transcript ~~bears~~ verify to the appellants contention. (See Reporter's Transcript Pages 1 and 2 which is on exhibit in this Court).

It is well established law that a reviewing court cannot look into matters outside the record (see People v. Lyons 22 Cal. Rptr. 307), and being as the record is silent on the issue of the invasion of the jury room by the agents of the state, direct appeal furnishes no remedy as a matter of law on that particular issue. To deny appellant a chance to be heard on the issue of the invasion of the jury room is a denial of due process and equal protection of the law. Appellant is entitled to be heard on all of the issues which he has presented as violations of his Constitutional rights. Appellant presented sworn affidavits to the United States District Court to the effect of the jury room invasion but that Honorable refuse to grant the relief sought or to explain why appellant was not entitled to be granted the requested relief.

ISSUES PRESENTED HEREIN

(1) WHETHER THE COURT BELOW ABUSED ITS DISCRETION BY FAILURE TO MAKE A FACTUAL DETERMINATION FOR THE ORDER OF DENIAL OF APPLICATION FOR WRIT OF PROHIBITION.

(2) WHETHER APPELLANT WAS DENIED A CONSTITUTIONAL RIGHT BY THE DENIAL OF HAVING WITNESSES GIVE TESTIMONY CONCERNING THE INVASION OF PRIVACY DURING THE JURY DELIBERATIONS.

(3) WHETHER APPELLANT'S CONVICTION AND CONFINEMENT VIOLATES DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT WHEREBY APPELLANT HAS ONLY A PARTIAL REMEDY IN THE STATE APPEAL COURTS.

(4) WHETHER THE AGENTS OF THE STATE (THE JUDGE THE DEPUTY DISTRICT ATTORNEY, AND/OR THE PUBLIC DENENDER HAD AN OBLIGATION TO REVEAL THEIR PERSONAL KNOWLEDGE THAT ONE OF JURORS SPOKE UNTRUTHFULL WHILE UNDER OATH.

1. ARGUMENT

a. The Court below did abuse its discretion.

Laws are made to be obeyed by rulers and people. The Court had a duty to give a determination of facts in the order of denial and Rule 52, Fed. Rules Civ. Proc. is holding as well as Rule ____ Local Rules of the Court below. Appellant had petitioner the Court below not as a stalling method. but as a remedy to elicit the truth of the occurnance of the rapid-fire violations of appellant's Constitutional rights by the agents of the state at the trial. Being as the State record is silent

concerning the invasion of the privacy of the jury room during deliberations for the verdict, the Court had a duty to receive testimony from witnesses with reference to the instrusion whereaby sworn affidavits by parties who witness the instrusion were presented to the Court. Appellant had moved the Court that the jurors be subpoenaed concerning the invasion, and appellant was legally entitled to have witnesses appear (Rule 45 (e) F.R.Civ.P) at the hearing for prohibition and the denial of said request was a denial of a fair hearing in the matter in violation of the Sixth and Fourteenth Amendments. California's Constitution Art. section 13 is interpreted to mean that appellant has no remedy unless an entire examination of the entire cause is had whereas an appeal is pending in the state courts. There can be no examination of the invasion without testimony due to the fact that the invasion was not reported. California Court Have held that the jury room shall be occupied by jurors only during the deliberation for the verdict (People vs. Britton 4 Cal. 2d 320; People vs. Brunemant, 4 Cal. App. 2d 75), and the Federal Courts have held that the presence of any person other than the twelve jurors impinges on privacy and secrecy of deliberations jury. (See United States vs. Virginia Errection Corp. 335 F.2d 876.) In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment. For that reason, the invasion by the agents of the state was a violation of the right to appear clause of the Sixth Amendment

which is make applicable to the states by the Fourteenth Amendment. Being as appellant was not present while the state agents were inside the jury room, it is fair, and legal, to assume that what occurred at that time was the direct cause for the jury's return a a guilty verdict, and the assumption would have a special effect when considering the fact that the agents entered the jury room to offer evidence, (see People V. Lowery, 70 Cal. 193.) The law is established that the Sixth Amendment safeguards the right to a fair trial by an impartial jury, (Gladden v. Oregon State No. 31 October Term 1966) and that a person accussed of crime has a right to be confronted, (Shepard v. Maxwell 384 U.S. 333,351 · Pointer v. Texas 380 U.S. 400). The United States Supreme Court stated in Turner vs Louisiana:

> "The 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is free judicial protection of the defendant's right of confrontation, of cross-examination and of counsel." 379 U.S. 466, 472-473.

This Court should take notice that the agents of the state has not, and cannot truthfully, denied the contention that the the jury was not one of Constitutional require. The verdict of a jury must not be disturbed, or it will not meet the Sixth Amendment standard of a fair trial. (Remmer v. United States 347 U.S. 227, 229; Mattox v. United States, 146 U.S. 140, 143. Gold v. United States, 77 S.Ct. 378.

2.

a. Appellant was denied a Constitutional right by the Court's failure to allow witnesses to give testimony in the hearing of the Petition for Writ of Prohibition.

"The All Writs Act 28 USC section 1651 (a) empowers the federal courts to 'issue' all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the ussages and principles of law. The exercise of this power is in the nature of appellate jurisdiction where directed to an inferior court (Ex Parte Crane 5 Pet 190 193 8 L ed 92 94 (1831) (Marshall C.J.) and extends to the potential jurisdiction of the appellate court where an appeal is not then pending may be later perfected." (Quoted from Vol 16 L ed 2d 807).

It was stated by the Honorable Mr. Justice Day in the case of McClellan v. Carland 217 U.S. 268 54 L. ed 762 (1910):

"(w)e thing it the true rule that where a case is within the appellate jurisdiction of the higher court a writ ... may issue in aid of the appellate jurisdiction which might otherwise be defeated. ..."

In Roche v. Evaporated Milk Ass'n 319 U.S. 21, 87 L.ed 1185 at 1189 (1943) Chief Justice Stone stated that the authority of the appellate court "is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. The district court acted

It is obvious that the Court below did not give credence to appellants contention of the invasion of the jury room, nor to the sworn affidavits which were presented. Being as the State has not denied the allegation, the Court below should have allowed witnesses to be subpoenaed to give testimony at the hearing in the matter of the petition for prohibition.

3.

a. The Fourteenth Amendment forbids a conviction which has been acquired in violation of the due process and equal protection clauses of that amendment.

The law is established that each person accused of crime is Constitutionally entitled to have the assistance of counsel at his trial (Sixth Amendment Constitution of United States). the law is also established that the Constitutional require of the assistance of counsel mean that counsel must be adequately /prepared/ /prior to trial./ Appellant was forced to proceed to trial with an attorney who was forced upon him, over objection, in the pfesence of the jury members. The record of the trial declare that appellant appeared in propria persona, and the Attorney for the Prosecution claimed that appellant had promised to be in propria persona. However, the record will not support that contention. An attorney, upon motioning that he be allowed to withdraw, stated to the court that he understood that appellant would appear in propria persona, (see Transcript entitled: Transcript of Various Dates Prior to Trial--April 22, 1966) but the attorney could not legally waive appellants' Constitutional

right to counsel. It was the duty of the court to inquire into the matter of counsel instead of accepting what the attorney said and then later fording appellant to stand trial without counsel. Appellant has at no time waived his right to counsel, and if the Court was opinionated that appellant's right to counsel could be legally waived by an attorney who was asking to withdraw from the case, appellant should have been told that he could not have counsel of choice at the next hearing. At the commencement of trial appellant did not request that the trial be had on another date, but that he be given a few minutes to retain another attorney who was at that time in the building, and with whom appellant had spoken to that very same day with respect to having him represent him. A waiver of counsel was necessary before appellant could legally appear without counsel (Johnson v. Zerbst, 304 U.S. 458, 464), therefore, appellant's had an indisputable right to counsel (Powell v. State of Ala. 287 U.S. 45). Appellant stated to the trial judge that he did not desire the assistance of the Public Defender (RT 2) and the said attorney was told that his services were not desired. Appellant was unconstitutionally deprived of his right to counsel whereas he was not accorded a clearcut explanation of his rights when he indicated to the court that he did not want the asigtance of the Deputy Public Defender, but wanted counsel of choice. (See Higgins v. Fay 364 F.2d 919 (1966) and for his own protection defendant who wishes to proceed pro se must make request to act as his own lawyer in order to invoke that

right. U.S.C.A. Const. Amend. 6--- United States ex rel Higgns v. Fay supra. If, as the record claim appellant was in pro per for trial, appellant was denied his Constitutional right to be represented by counsel which is guaranteed by the Sixth Amendment of the United States Constitution. The Attorney General of California has declared that appellant was represented by counsel at ttrial despite the record contention that appellant appeared in propria persona. If that is correct, Court-appointed counsel should have been given time toprepare (Joseph vs. United States. 321 F.2d 790), and without time for counsel to prepare, a conviction will not stand, (Townsend vs. Bomar. 351 F.2d 499). Legal representation is not adequate and trial does not meet statdndard of fundamental fairness if court-appointed counsel is not afforded adequate opportunity to investigate and reflect upon client's case. In Martin vs. Commonwealth of Vir.. 365 F. 2d 549.(1966) the Honorable Judge Sobeloff, D.C. Cir. Stated:

> "The Court recognizes that in each of these cases (dealing with effectiveness of court-appointed counsel's representation) the facts were different. The appellate courts have insisted that ample time be allowed counsel for preparation. They pointed to possible prejudice in some of the cases, but a showing of actual prejudice is not the basis on which these cases rest. The lack of opportunity for ~~xxxxxxxxxx~~ investigation, reflection, conference, and mature consideration which results from trials of felonies immediately after appointment of counsel provides the basis for granting the writ. *** Courts need not look for specific prejudice. The burden isn't on the petitioner to show that he wouldprofit by a trial in which counsel had more time for preparation. Lack of due process is implicit when a felon is tried immediately after the appointment of counsel. * * * To hold otherwise simply invites courts to continue the procedure that leads to pro forma representation. The State can show no compelling for indicting a felon, appointing counsel, and

trying him all on the same day." (See also Estes vs. State of Texas, 381 U.S. 532)

Appellant shall not go to great lenght to show that court /counsel/ /realize/ /appointed/ was not prepared; appellant also /relaxed/ that the burden is a heavy one. However, the following statement sums up issue ~~xx~~ entirely---quoting Reporter's Transcript:

> MR. WEEKS: (Public Defender) May it please the court, in view of the fact /your/ /you/ Honor appointed me to assist the defendant this morning, obviously I have not had an opportunity for discovery, and under the circumstances, before the tapes are played in the court before the jury, I would respectfully move for discovery and the opportunity to hear the tapes before that time so that if the District Attorney___ _if your Honor will permit me to listen to them." RT 13: 19 thru 26.

On another occasion the following was had:

> MR. WEEKS: Now, excuse me, your Honor, please, I am a little bit handicapped. RT 45: 2,3.

The United States Supreme Court stated in Chandler v. Fretag, 348 U.S. 3 , 75 S.Ct. 1:

"It is clear that a defendant in a state criminal trial has a right, under the due process clause, to be heard throug h his own counsel."

If the court was going to force counsel upon appellant, there was, by law, an attorney of record and he should have been the attorney forced to represent the defense. The fact that court-

appointed counsel entered the jury room is absolute proof that counsel was in collusion with the attorney for the state to deprive appellate of his right to a Constitutionally fair trial. Appellant is confined in violation of his Constitution rights with respect to the due process and equal protection clause of the Fourteenth Amendment.

4.

a. The agents of the state (Judge, Dep. District Attorney, and the Dep. Public Defender each had knowledge that one juror made false statement on voire dire examination.

One of the questons which was asked the jurors during the voire dire examination was whether or not they (he or she) had relatives or friends who were members of law-enforcement. One juror, Mrs. E. Dorothy Hegerhorst, Mrs. A. Dorothy Hegerhorst, stated as follows:

MR. MEEKS: (RT 24:6) Were you able to hear the questions I asked the other prospective jurors?

A. Yes. Q. If I asked you the same questions your answers would be the same? A. Yes.

MR. MEEKS: Pass for cause.

At RT 23:19 (SUPPLEMENTARY REPORTER'S TRANSCRIPT ON APPEAL) the Court asked Mrs. Hegerhorst: "You don't know this man over here, Mr. Hegerhorst? A. Just a little.

Mr. Hegerhorst (it has been learned) is a brother-in-law to Mrs. Hegerhorst; Mr. Hegerhorst is a member of law enforcement and he was on duty as an Officer of the Court--Court Bailiff--at

the time when the juror made the statement which is false beyond a doubt. The question concerning friends or relatives in law-enforcement had been asked five different times one juror had some causal acquaintance who were law-enforcement members, an another juror had a neighbor. This was adequately discussed and juror, Mrs. Hegerhorst surely understood what was said. In saying that her answering questions would be the same as the answers which were given by the jurors examined before her. she denied her relationship with her brother-in-law who was by the the same as her brother. It is a human impossibility not to be influenced by what is under your vision over a period of years. Mrs. Hegerhorst is the mother of a grown child and it may therefore be assumed that she has been a member of the Hegerhorst family for at least twenty years---it may not easily be assumed that she knew her brother-in-law "just a little" after being in the same family for such long period of time.

> In order to ascertain whether a juror is prejudiced in a particular case it has always been held proper to inquire as to his membership in any political, religious, social, industrial fraternal, law-enforcement or other organizations whose beliefs or teaching would prejudice him for or against either party to the case. People v. Boyle, 22 C.A. 2d 147 at 176.

What is of importance is the fact that Mrs. Hegerhorst knowingly concealed her relationship. It matters not why she concealed the fact that the Bailiff was her brother-in-law; the agents of the state (Judge, Def. D.A., Dep. P.D.) knew of the relationship and failed to intervene. Therefore each of the

agents of the state became a part of false statement. "A lie is a lie" (Napue v Illinois. 360 US 264) and "unfairness or corruption of offecers in performance of administrative functions in civil or criminal cases is a violation of the ~~of the~~ Fourteenth Amendment," 98 ALR 2d 411. The agents of the state were duty bound to reveal the information that the juror had spoken falsely.

b.

The agents of the state knew that the Court Bailiff and the juror, Mrs. Hegerhorst should not have been in the jury room at the same time during the deliberation for the verdict, but such did occur. It is likely that said juror voted the way that she thought to be suitable to her brother-in-law.

c.

The agents of the state (Judge, Dep. D.A., Dep. P.D.) were aware that the court-appointed attorney with-held names that were signed upon a document introduced as defendant's exhibit A.

CONCLUSION

The Fourteenth Amendment is a jurisdictional bar against a state depriving a person of life, liberty or freedom without due process of law having been afforded. It cannot be said that appeal furnishes a remedy whereby some contentions cannot be heard being as they dehor the record. Appellant's conviction violates the equal protection and due process clause of the Fourteenth Amendment and for that reason it must be reversed.

Porter D. White

Porter D. White, In Pro. Per.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN THE MATTER OF THE APPLICATION OF	No. 22409
Porter D. White, Appellant,	AFFIDAVIT OF SERVICE
AFFIDAVIT OF SERVICE OF MAIL	OF MAIL

UNITED STATES OF AMERICA)
STATE OF CALIFORNIA) SS:
COUNTY OF LASSEN)

WHEREAS, Porter D. White, Appellant, deposes and says, he is a citizen of the United States, over the age of twenty-one, (21) years and a party to the within action; his address is the California Conservation Center, Box 2210, Susanville, California.

On the 25th day of January, 1968, petitioner enclosed a true and correct, and duplicated copies of the within:

OPENING BRIEF ON APPEAL

in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, placed said envelope in the hands of theproper Institutional Authority for the purpose of depositing the same in the United States Mail at the City of Susanville, County of Lassen State of California with postage thereon fully prepaid, there is delivery service by mail at each of the places so addressed.

(1) The ORIGINAL AND 19 COPIES to: Mr. William B. Luck, Clerk United States Courts of Appeals, For the Ninth Circuit, Box 547, San Francisco, California.

(2) 3 COPIES to: Thomas C. Lynch, Attorney General of California, 600 State Building, San Francisco, California.

DATED: January 23, 1968

Subscribed to and sworn to before me this_____day of_____, 1968.

_____ _____ _____